ADDRESS BY SENATOR STROM THURMOND (D-SC) ON PROPOSAL TO ESTABLISH RULES OF INTERPRETATION FOR THE SUPREME COURT TO FOLLOW IN INTERPRETING THE INTENT OF CONGRESS, SENATE FLOOR, AUGUST 28, 1958

Mr. President, those of us who have been urging Congress to enact legislation to protect the States from the unwarranted extension of Federal power sometimes suspect that we are being smothered with kind regards. It is very difficult to find an avowed enemy of States' Rights. In principle, it appears, every member of this distinguished body is a friend of the 48 sovereign States and wishes them to exercise their full rights and powers.

When it comes down to cases, however, it is an entirely different matter. Bills aimed at protecting the rights and powers of States are invariably attacked, not because anyone objects to the principle of concurrent jurisdiction, but because there are always alleged flaws in the bills. In picking out these supposed flaws, opponents of States' Rights legislation are lamentably inconsistent.

For example, during this session of Congress there have been two proposals affecting the relationship between the States and the Federal government which have attracted widespread support. One of these proposals is under attack principally because it is a bill to correct specific Court decisions. The leading objection brought against the other is that it is too general.

The proposal which is said to be too specific is the Jenner-Butler Bill, S. 2646, which deals with specific instances in which the Supreme Court has either misinterpreted the intent of Congress or of the Framers of the Constitution. The bill remedies the bad effects of
several specific Court decisions. The decisions are not closely related, although they all deal with the powers and functions of government. Therefore, the principal objection raised to the Jenner-Butler Bill is the claim that it is a "shot-gun" bill, hitting a specific case here, and another specific case there, without framing a general philosophy which can be applied to a whole broad field of legislation.

An objective onlooker might suppose that those who object to the Jenner-Butler Bill on the ground that it deals with specific cases would be delighted to support H.R.3, the anti-pre-emption bill, or some variation thereof. H.R.3 passed the House recently by a vote of 240 to 155. It does not pick out specific decisions of the Supreme Court and overturn them. It simply establishes a rule of interpretation for Federal courts to follow in cases involving the doctrine of Federal pre-emption. It sets down in clear and unmistakable terms a principle which is generally acceptable to all.

Nevertheless, a substantial number of those who have been telling us that the Jenner-Butler Bill should not be passed because it deals with specific cases are objecting to the anti-pre-emption proposal because it is broad and general.

There is no consistency in this position. I am forced to the reluctant conclusion that some of those who call themselves friends of the States, in principle, are opposed to all legislation aimed at protecting the rights and powers of the States. I am thankful for the kindness of these individuals in speaking for the principle of States Rights, but I wish that they would not smother all legislation in this field with their kindnesses.
For myself, I believe that both specific and general legislation is needed. We need legislation to correct specific decisions of the Supreme Court in which the intent of Congress has been misinterpreted. Such legislation should be crystal clear; it should cite chapter and verse to make it unmistakable that a court ruling is being corrected.

No doubt some would desire that we not undertake to correct the Supreme Court when it misinterprets the intent of the Congress or of the Framers of the Constitution because they do not wish to embarrass the Court or because they believe the Court to be infallible. If they hold this former belief, then they should join in the effort to provide the Court with these rules of interpretation which should assist the Court in establishing the intent of Congress, thereby reducing the necessity of subjecting its decisions to Congressional scrutiny and review. If, on the other hand, they believe the Court to be infallible, then they should vote against this proposal because it is designed only to lessen the chances of human error.

It is the duty of the Congress to provide the Court with rules of this nature which will be helpful in considering cases in which the meaning of an Act of Congress is in dispute.

Such rules of interpretation should be simple and clear so that the Court will have no difficulty in understanding how to follow the guidelines. The proposed rules which have been placed before this body plainly state that which urgently needs to be stated:

(Read Amendment)

The anti-pre-emption proposal does not add or detract from the constitutional powers of the States.

It does not add or detract from the powers of Congress. It does not limit the jurisdiction of the Court.
It deals solely with legislation in fields in which power has been delegated to the United States by the States through the Constitution. This proposal has not -- could not have -- any application whatsoever to matters outside the enumerated powers of Congress, to matters reserved to the States by the Constitution.

We are dealing here only with the doctrine of pre-emption. The question of pre-emption is one that arises only in fields in which both the States and the Congress have legislative powers -- in other words, fields in which Congress has been granted powers by the States through the Constitution. And it is generally conceded that in those fields in which the Congress has legitimately and clearly been granted powers under the Constitution, Federal law on the subject takes precedence over State law. Everybody admits that. So just what is all the hue and cry about, Mr. President? What on earth prompted the hysterical charge that this bill would strike down the Federal supremacy clause?

This bill, of course, would do no such thing, Mr. President. It is admitted, I repeat, that in those fields in which, under the Constitution, power is delegated to the Congress, Federal law takes precedence. This does not, however, mean that Federal law in those fields is exclusive. Yet this is what the Supreme Court's false and extreme application of the doctrine of pre-emption tends to imply.

The mere fact that power is delegated to the Congress in certain fields does not mean that the States are powerless to act in those fields. Suppose, in some field in which the power to legislate is delegated to the Congress, the Congress fails to act.
Shall there be no regulation whatsoever of this activity? Or suppose the Congress legislates in only a small portion of this field. Shall all the rest remain unregulated? Of course, Congress could intend that there should be no regulation; if this should be the case, it can easily declare its intent to that effect. But, Mr. President, this is Congress' business, and it is the Congress which should determine its own intent. It should not be left up to the Supreme Court to determine the Congress' intent.

Mr. President, when the Congress legislates in an area, if it intends thereby to pre-empt that entire area to the exclusion of the States, it should say so. Similarly, if the Congress has intentionally not passed any legislation in a certain field, and wishes that field to remain totally free of regulation on any level, it should make its position clear. It should not be left up to the Supreme Court, years later, to apply the doctrine of pre-emption or to determine that the silence of Congress indicated a legislative wish that there be no State regulation of the field of activity in question.

Mr. President, it is far more beneficial to all segments of society for Congress to lay down in advance the broad principles which the courts are to observe than to have to take specific action later to undo the results of a decision of the Court. The latter process may entail long delay, and in the meantime havoc can be wrought in whatever field of activity of American life is affected by the decision.

I shall recall to the Senators' minds how an entire American business, reaching into nearly every home in America and affecting practically every man, woman, and child in this broad land, was thrown into complete turmoil by a decision of the Supreme Court. The example to which I refer is that of the American insurance profession and the
SEUA case, *(United States v. Southeastern Underwriters Association, 322 U. S. 533, 88 L. Ed. 1440, (1944)).*

The effect of this decision, which was handed down in 1944, and which reversed the long-standing rule laid down 75 years before/in *Paul v. Virginia*, was to knock the props out from under the regulation of the insurance business by the States. Since State regulation was clearly in the best interests of all concerned, it was necessary for the Congress to take steps/to restore the power of the States to regulate. This it did, through Public Law 15 of the 79th Congress, and thus the situation was finally rectified, but only after incalculable trouble and confusion had been caused/to the business, the public, and the government.

We certainly do not want to have a repetition of such turmoil/in any phase of American life. Enactment of the proposed rules of interpretation will go a long way toward eliminating the danger of such repetitions. The courts will be put on notice that it is the intent of Congress/to respect the rights of States/in any field of concurrent jurisdiction.

Mr. President, I have carefully studied the arguments presented by the opponents of this bill. As I have mentioned, all are careful to doff their hats politely to the principle of States' Rights. Nevertheless, they object to the passage of the bill, and principally on the ground that enactment of this legislation would somehow disturb the balance of powers between the States and the Federal government, or between the legislative and judicial branches of the Federal government, and that this derangement of the established order would encourage a flood of unnecessary litigation.
There are two major fallacies in this line of thought.

First, the notion that the bill proposes any alteration in the constitutional division of power can be dispelled quite simply by reading the language of the bill. The philosophy of the bill is not a new philosophy. It is the philosophy tersely expressed by the Supreme Court in the historic case of Texas vs. White (7 Wallace 700 (1869)): "The United States is an indestructible Union composed of indestructible States."

Second, the belief that enactment of the bill will invite a flood of litigation is tenable only if we accept the obviously unsound premise that any clarification of the rules of interpretation is an invitation for law suits. If we accept this premise, we must reject all efforts to clarify and codify the laws.

This bill will not invite litigation; on the contrary, it will discourage litigation. Consider, for example, the Steve Nelson Case. In that case, although it was clearly not the intent of Congress to strike down the State anti-sedition laws, the Court ruled that the dominant interest of the Federal government precluded State intervention. The Court, by implication, invited challenges to other State laws in fields where there might be a dominant Federal interest. This anti-pre-emption proposal does not invite litigation; it discourages it by making the rules clear.

Mr. President, the historic test of Federal pre-emption laid down by John Marshall (6 Wheaton 264, 443) is that the intent of Congress to pre-empt the field of legislation to the exclusion of the States must be "clearly and unequivocally expressed."
There would be no necessity for the proposed rules of interpretation if Justice Marshall's test had been followed in recent years. But the Supreme Court has rejected that, most notably in the Nelson Case.

In the Nelson Case, the Court took cognizance of the fact that sedition is a Federal crime under Title 18 (Crimes) of the United States Code, but it completely ignored Section 3231 of this Title, which states:

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof.

This was a case in which Congress and the State legislatures had concurrent jurisdiction. There was no conflict between the State and Federal laws. The Executive Branch of the government, in an amicus curiae brief filed in the Nelson Case, stated:

The administration of the various state laws has not, in the course of the 15 years that the Federal and State sedition laws have existed side by side, in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act... Moreover, the problem of subversion, as we think Congress recognized, is of such magnitude as to invite federal-state cooperation in the enforcement of their respective sedition laws. Thus the Attorney General of the United States recently informed the attorneys general of the several States in this connection that a full measure of Federal-State cooperation would be in the public interest.

Yet, in the face of overwhelming evidence to the contrary, the Court divined an intent of Congress to occupy the field to the exclusion of State legislation.

What does this mean? Would the enactment of an aid-to-education bill lead the Supreme Court to decide that Congress had intended to pre-empt the entire field of education? Can the fact that the Federal government levies an income tax be interpreted to mean that Congress
intended to exclude the States from this tax field? These speculations are admittedly far-fetched, but hardly more so than the distortions of interpretation which led the Supreme Court to the Nelson decision.

In brief, what is required is that Congress state that it favors the maintenance of State laws in areas in which the Federal government also has laws, unless there is a direct and positive conflict between the laws, or unless Congress specifically states otherwise.

If Congress wishes to state, in enacting a particular bill, that it intends to nullify parallel State laws, it may do so. One of the intangible benefits of the bill, indeed, is that it will encourage Congress to consider pending legislation from the point of view of its effect on existing State laws.

It is incumbent on Congress, as well as on the Supreme Court and the Executive Branch, to take thought of the rights reserved to the States and to the people by the Constitution, and to avoid further encroachments on the rights of States.

The tragic alternative is the total centralization of power in the Federal government, the reduction of the States to mere political sub-divisions, and the death of local self-government in this nation.

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